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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re the matter of Trademark Application No. 78/116,976
For the mark **OXIUM**
Published: February 3, 2004

Therox, Inc., Applicant, v. Smithkline Beecham Corporation, Opposer.	Opposition No. 91160810
	APPLICANT'S OPPOSITION BRIEF

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I. STATEMENT OF THE ISSUES

Applicant, TherOx, Inc. (hereinafter "TherOx" or "Applicant") filed an intent-to-use application for the mark OXIUM, U.S. Application Serial No. 78/116,976, on March 22, 2002 for goods identified as "Oxygenated skin care preparations, namely, creams, masks, gels and lotions for the face, hands, feet and body, not including acne preparations," in International Class 3.

Opponent, The Mentholatum Company (hereinafter "Mentholatum" or "Opposer," instituted the instant opposition based on its, and its predecessor in interest, registration and use of various OXY marks for goods identified as various forms of acne medication, based on a theory of likelihood of confusion under Section 2(d) of the Trademark Act. (15 U.S.C. §1052(d)).

Applicant asserts there is no likelihood of confusion, thus no basis for the instant opposition, and therefore such proceeding should be dismissed. Support of such dismissal is supported by the evidence below.

II. DESCRIPTION OF THE RECORD

The record before the board consists of the pleadings, the prosecution history for the mark OXIUM as applied for by TherOx, and the testimony and evidence below.

Evidence of Applicant

1. Applicant's U.S. Application Serial No. 78/116,976 for the mark OXIUM filed on March 22, 2002 for goods identified as "Oxygenated skin care preparations, namely, creams, masks, gels and lotions for the face, hands, feet and body, not including acne preparations," in International Class 3.

2. Applicant's testimony deposition of Jeffrey Creech, taken on December 19, 2006, including exhibits and portions of the deposition designated as "Confidential" pursuant to a stipulated protective order entered by the parties.

3. Opponent's answers to Applicant's interrogatories.

Evidence of Opposer

1. Opposer's Notice of Reliance on nine (9) trademark registrations Pursuant to Trademark Rule 2.122(d).[1]

2. Opposer's Notice of Reliance on twenty-seven (27) trademark registrations owned by third parties Pursuant to Trademark Rule 2.122(d).

3. Opposer's Notice of Reliance on six (6) trademark registrations owned by third parties Pursuant to Trademark Rule 2.122(d).

4. Opposer's testimony deposition of James C. Brown, taken on October 11, 2006, including exhibits and portions of the deposition designated as "Confidential" pursuant to a stipulated protective order entered by the parties.

5. Opposer's testimony deposition of Todd S. Cantrell, taken on October 19, 2006, including exhibits and portions of the deposition designated as "Confidential" pursuant to a stipulated protective order entered by the parties.

III. RECITATION OF FACTS

A. Applicant's Testimony

On March 22, 2002, Applicant filed an intent-to-use application with the USPTO for the mark OXIUM for use in association with its oxygenated skincare products; the mark is not to be used on any acne medication products (U.S. Application Serial No. 78/116,976).

[1] Applicant objects to any evidentiary value of any of Opposer's registrations which were applied-for after Applicant's March 22, 2002 filing date, namely U.S. Registration Nos.: 2,919,984; 2, 874,733 and 2,919,983, all filed more than a year after Applicant's OXIUM application filing date. The Board is asked to disregard as irrelevant any registration/application of Opposer filed after Applicant's own filing date.

On December 19, 2006, Applicant took the testimony deposition of Jeffrey Creech. Mr. Creech is the program manager of research and regulatory affairs for Applicant company TherOx (Creech Depo. p.7, lns.7-9). Applicant created a unique cosmetic anti-aging cream which contains actual emulsified oxygen.

In selecting a mark for this unique product, Applicant focused on choosing a mark that referred to its oxygen content and specifically avoided any suggestions of "acne medication" including Opposer's mark (Creech Depo. p.14, lns.19-22; p.15, lns.7-10; p20, lns8-10, 12-13; p.23, lns.7-9 and Exhibit 2). Applicant does not intend to use the OXIUM mark nor the OXIUM product for acne treatment as it is not an effective acne-medication; in order for Applicant to market an acne medication, it would have to create a wholly different product (Creech Depo. p 49, lns 18-25; p. 50 ln. 1p. 35 lns. 13-16) which would necessarily be marketed under a different trademark as Applicant's identification of goods specifically excludes acne medication (U.S. Application Serial No. 78/116,976).

Given the uniqueness of the cream – namely that it contains a dissolved gas, oxygen – it must be kept in a pressurized can fitted with an internal collapsible lining in order to both keep the cream under pressure and to prevent contact between the cream and any other substance (Creech Depo. p.26, lns. 2-13; p.46, lns 18-25; p.47, lns.1-5; Ex. 6). It cannot be placed in ordinary plastic, jars, bottles, or packets (*id.*) In addition, given the relatively high cost involved in producing this product, it has been available only in one-ounce cans (Creech Depo. p. 10, lns 20-25; p. 12, lns 1-25, p. 13, lns.1-5).

Since Applicant's product is an anti-aging product, its intended consumers are women between the ages of thirty-five and sixty-five (Creech Depo. p.12, ln. 25; p.13 lns.1-14). Given the cost of manufacturing, the one-ounce can of OXIUM cream retails between $70 and $100. Applicant intends to offer it in retail locations in which women with a disposable income tend to shop, such as department stores, beauty salons, specialty skincare stores and spas (Creech Depo. p.20, lns. 10-12; p.28 lns.11-21, p.32, lns. 11-12). Since the intended consumer of the OXIUM product is the woman who also tends to be interested in cosmetic procedures, Applicant also intends to offer its product at medi-spas and dermatology offices (*id.*).

B. Opposer's Testimony

Opponent relies on nine of its registrations for various uses of its mark OXY all of which are used on goods identified as *acne medication* (with the exception of one mark used in association with video game software used to promote its anti-acne medication) (Notice of Reliance).[2]

On October 11, 2006 Opposer took the testimony of James C. Brown. Mr. Brown was the brand manager for Opposer's predecessor in interest, SmithKline Beecham Corporation[3] (Brown Depo. p.11, lns. 5-2). Mr. Brown's duties included marketing the OXY brand anti-acne medication to the relevant customers, and as such is familiar with the history of the brand, its marketing, promotions, and sales (Brown Depo. p.11, lns.11-20; p.12, lns. 10-25; p.13, lns 1-10).

On October 19, 2006, Opposer took the testimony of Todd S. Cantrell. Mr Cantrell is the current brand manager for the OXY products under The Mentholatum Company. (Cantrell Depo. p.8, lns 17-18; p.11; lns 5-18). Mr. Cantrell's duties also duties included marketing the OXY brand anti-acne medication to the relevant customers and as such he is familiar with the more recent history of the brand, its marketing, promotions, and sales (Cantrell Depo. p11, lns 21-23; p12, lns 1-5, lns 19-23; p. 13. lns 1-20).

Opposer, The Mentholatum Company, has sold *only* anti-acne medication under the OXY brand for over thirty years (Brown Depo. p.13, lns. 18-25; p.14, lns. 1-24; Ex. 4, 5; p.15, lns.12-15; Opposer's Brief p.5, lns. 7-8). Opposer sells its anti-acne medicated products in all fifty states at a price range between $4.99 and $6.99 (Cantrell Depo. p 18 l15-16) at mass retail stores such as Wal-Mart, K-Mart, CVS, and grocery stores (Brown Depo. p.18, lns.22-25; p.19, lns 1-11; p.48.lns.2-8).

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[2] Applicant renews its objection to any application/registration filed after March 22, 2002.

[3] Contrary to Opponent's contention, the fact that Mr. Brown's role was prior brand manager does not establish priority, use, nor fame of any marks; the mere fact that Mr. Brown has a certain role with the company cannot, and does not, determine priority, use, or fame of a mark.

Opposer's advertising of its anti-acne medication is directed primarily to teenagers (Brown Depo. p. 26, lns 3-9) includes television and print advertisements, a website on the internet, and sponsorship of extreme sport athletes and events (Cantrell Depo. p.24, lns. 6 – 11; p.25, lns. 1-23; p.26, lns. 1-23; p.27, lns. 14-15; p.29, ln. 14; p.31, lns.1-23; p.32, lns.19-23; p.34, lns. 1-16; p.36, lns.1-23; p.37 lns.1-16; p.28, l13-22; p.39, lns. 20-23; Ex. 4; Brown Depo. p.23, lns 14-18; p.39, lns.8-13; p.42, lns. 16-19; p.44, lns. 6-9; Ex 8, 10, & 11).

Opposer has experienced a downward trend of customer awareness;

IV. ARGUMENT

A. Failure to State Grounds for Opposition

Applicant is informed and believes, and thereon alleges, that the facts set forth in the Notice are insufficient to justify denial of its application as there is absolutely no likelihood of confusion under Section 2(d) of the Trademark Act.

Opposer claims in its brief that it has prior use and registration of various marks which comprise or include the term OXY for goods described as *acne medication, skin care preparations, skin wash and skin cleansers*. Applicant ***DOES NOT have prior use*** and ***DOES NOT own any registration*** for marks for "***skin care preparations, skin wash and skin cleansers***" as it claims in its brief (Brief p.1, 4). Opposer owns registrations and prior-use rights ***ONLY for acne medication***, namely "acne medication," "topical acne medication, medicated face wash and medicated skin wipes," and "medication for treatment of acne.[4]"

B. No Likelihood of Confusion

[4] Opponent also owns THE OXYGENATOR for use in association with video game software used to promote its anti-acne medication.

In determining whether a likelihood of confusion exists, courts must make a comparison of the marks at issue and the associated goods taking into consideration all relevant facts in evidence bearing on likelihood of confusion. This analysis is guided by the "duPont Factors" which consists of the following: "1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression; 2) the similarity or dissimilarity and nature of the goods and services as described in the application or in connection with which a prior mark is in use; 3) the similarity or dissimilarity of established, likely-to-continue trade channels; 4) the conditions under which the buyers to whom sales are made i.e. "impulse' vs. careful, sophisticated purchasing; 5) the fame of the prior mark in terms of sales, advertising, and length of use; 6) the number and nature of similar marks in use on similar goods; 7) the nature and extent of any actual confusion; 8) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion; 9) the variety of goods on which a mark is or is not used i.e. house mark, family mark, product mark may also be considered; 10) the market interface between applicant and the owner of a prior mark; 11) the extent to which applicant has a right to exclude others from use of its mark on its goods; 12) the extent of potential confusion i.e. whether *de minimus* or substantial; 13) any other fact probative of the effect of use" *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The weight of each factor varies case-by-case and, no one factor is determinative. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). An analysis of the relevant "duPont Factors" demonstrates that there is *no likelihood of confusion* between the mark of Applicant and that of Opposer's.

i. Factor 1: Applicant's Mark Is Dissimilar In Its Entirety As To Appearance, Sound, Connotation, And Commercial Impression.

Substantial differences exist between the appearance, sound, connotation and commercial impression between the mark of Applicant and the mark of Opposer. A comparison of marks analysis focuses on the recollection of the average purchaser and marks are to be examined in their entireties, however dominant features of a mark may also be taken into consideration. *Dealed Air Corp v. Scott Paper Co.* 190 USPQ 106 (TTAB 1975), *In re Chatam International, Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir 2004); *In re National Data Corp.* 753 F.2d 1056, 224 USPQ 749 (Fed.Cir.1985).

Initially, Opposer knowingly falsely suggests, that in the creation of Applicant's mark, Applicant began with Opponent's mark, then altered it. ("Applicant has merely changed Opposer's OXY to OXI and added UM to create its mark." Opponents Brief p.14, lns.12-13). Instead, Opposer's starting point for the creation of its mark was not with Opponent's mark rather it was the word "oxygen" (Creech Depo. p.14, lns. 19-22, p.15, lns. 7-10; p.20 lns. 12-13). In fact, Applicant intentionally *avoided* any use of anything similar to Opposer's mark so to suggest that Applicant *started* with Opposer's mark is absurd. (Creech Depo. p.20, lns. 8-10; p.23 lns.7-9; Exibit 2)

Applicant maintains that Opposer's mark OXY does not have any dominant part; however arguendo, if it does have a dominant part it must be the mark OXY as a whole as Opponent never uses its mark in any manner which would create a "family" of marks (see registrations). Opposer arbitrarily splits Applicant's mark between the "I" and the "U" in order to fabricate a similarity to its mark. Although Opposer comes to the completely unfounded conclusion that OXI is the dominant part of Applicant's mark, Applicant contends that its mark does not have any one particular dominant part and therefore its mark should be examined in its entirety.

Appearance. Applicant's mark, OXIUM is five letters long, only two of which are found in Opposer's mark OXY. Opposer states that "Both marks begin with OX followed by a Y or an I." (Opposer's brief p.14, lns.12-13). This statement is misleading; however as *both* marks do not have a "Y" or an "I," rather one does, and one does not. Opposer's mark has a "Y" and never an "I." (Cantrell Depo. p. 60, lns 12-14). Applicant's mark has an "I" and never a "Y." Opposer's statement; therefore, is only correct in that "both marks begin with OX."

Sound. In addition to being a much longer word than Opposer's, Applicant's mark sounds very different than Opposer's. In *Truescents v. Ride Skin Care*, Opposer challenged registration of the mark GENUINE RIDE SKIN CARE as likely to be confused with its mark GENUINE SKIN. The TTAB stated ""the word RIDE does not appear and would not be spoken in Opposer's mark, and this point of aural dissimilarity outweighs any similarity resulting from the marks' common use of GENUINE and SKIN" *Truescents LLV v. Ride Skin Care, LLC,* (TTAB 2006).

Just as "ride" does not appear in GENUINE SKIN, "ium" does not appear in OXY, nor any other mark registered by Opposer. Therefore IUM would not be spoken and the aural dissimilarity, here too, outweighs any similarity of the common use of only two letters.

Furthermore, the pronunciation of a three-syllable word carries the stress on the third syllable, and a two-syllable word carries its stress on the second; thus, it is the "um" that is the longest syllable in applicant's mark, and the "y" is the longest syllable in Opposer's mark. Therefore, there is no similarity in sound between the mark of Applicant and that of Opposer's beyond the first syllable.

Connotation. Applicant's mark is a fanciful word that has no meaning. (Although it is suggested to be a fictional reference to a material found on the planet Mars (Creech Depo p. 22, lns. 22-23). Applicant chose this mark in the hope that it suggested the products *oxygen* content but also wanted a medical feel to the name (Creech Depo. p.14, lns. 19-22; p.15, lns. 7-10; p.20 ln 12-13;Ex.2 p3). On the other hand, Opposer's mark is descriptive of its benzoil peroxide content.

Commercial Impression. Applicant's mark is placed on small, specialized aerosol-type cans which hold one ounce of product; Applicant's mark is never placed in plastic, nor on jars, bottles, or packets. (Creech Depo p.26 lns. 2-13; p.46 lns. 18-25; p 47, lns. 1-5; Ex.6 p.1). Applicant's mark OXIUM is incorporated with the simple, pale colored, elegant, trade dress which resembles a feminine-deodorant product to appeal to its female luxury goods purchaser (Creech Depo. Ex.6 p.4). Opposer's anti-acne medication sold under the OXY mark appears in black plastic jars, plastic bottles, and plastic packets with bright colors and bold lettering that appeals to its teenage market (Brown Depo. p. 53, lns 12-15). The commercial impression of the two marks are vastly different: high quality, elegant and refined versus cheap, chunky, and bold.

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OXY – Mentholatum	OXIUM – TherOx, Inc
The following products are pictured in Exhibit 3 of Cantrell Deposition; reproduced here for comparison.  OXY. *Chill Factor*™ Daily Cleansing Pads   Chill Factor™ Daily Wash  	TherOx's Product is identified in Exhibit 6 of Creech Deposition; reproduced here for comparison. 

Given the significant differences in appearance, sound, connotation and commercial impression, the first factor weighs in favor of Applicant.

ii. Factor 2: The Nature Of The Goods Associated With Opposer's Mark And Those Described in Applicant's Application, Are So Dissimilar That Consumer Confusion Is Highly Unlikely.

As Opposer correctly points out (Opposer's Brief p.21 lns. 5-10) "The authority is legion that the question of registerability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sale of goods are

directed" *(Octocom Systems, Inc. v. Houston Computer Services, Inc.* 918 F.2d 937, 16 U.S.P.Q. 2d (BNA 1783))(Emphasis added).

Not once, in its entire argument under the similarity-of-goods factor, does Opposer acknowledge or discuss the goods set forth in the application of Applicant or of its own registrations, rather Opposer's entire argument of relies on the record, which include actions of competitors, third party registrations, ingredients of competitive products, ideas Opposer has for future products, and third party classifications – but never the actual description of goods as submitted to the USPTO.

In addition, we must initially point out that Opposer attempts to latch on to the broader "skincare" category and claim that "skincare" is the good in which it has the right to use its mark in association with; however, *Opposer's goods are not skincare generally*, rather it is *only anti-acne medication specifically.* Opposer has offered *nothing but anti acne medication products for over thirty years* (Brown Depo. p.13, lns. 18-25; p.14, lns. 1-24; p.15, lns.12-15; Opposer's Brief p.5, lns 7-8.). Opposer's identifications of goods[5] consist **solely** of "acne medication," "topical acne medication, medicated face wash and medicated skin wipes," and "medication for treatment of acne." (Notice of Reliance submitted 10/16/06). Each non-promotional identification refers to acne medication, therefore in this analysis of likelihood of confusion applies only to *medicated acne products* (and their normal channels of trade and normal classes of consumers) and *not* any non-acne skincare products it feigns intent to introduce in the future.[6]

The goods of Applicant are identified specifically "Oxygenated skin care preparations, namely, creams, masks, gels and lotions for the face, hands, feet and body, not including acne preparations." Therefore, the goods are not similar as Applicant's product is not "acne medication" or medication of any sort, nor does the identification of Applicant's goods encompass the goods of Opposer.

Applicant's and Opponent's identification of goods as described in their respective applications show the goods to be different; therefore it is improper to assume that different goods follow the same channels of trade or that different goods have the same classes of consumers.

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[5] The other mark cited, THE OXYGENATOR by Opposer's identifies its goods as promotional videogame software and on line games.

[6] Application Serial No.: 78774055 was filed December 15, 2005, well into the discovery period of this Opposition.

For the sake of addressing Opposer's arguments, and despite the controlling authority discussed above, Applicant addresses the goods, channels of trade, and relevant consumers based on what the record has provided.

A comparison of the goods examines not whether the goods would be confused with each other, rather whether the goods are so related or the circumstances in which consumers encounter such goods create a possibility of confusion as to source of the goods or a confusion as to affiliation with the source of the goods. *In re Martin's Famous Pastry Shoppe, Inc.* 748 F.2d 1565, 225 USPQ 1298 (Fed. Cir 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); and *In Re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).)

Substantial differences exist between Applicant's anti-aging cosmetic product and Opposer's anti-acne medications which include, but is not limited to, product composition, purpose, method of dispensation, method of use, and government regulatory requirements.

Opposer's anti-acne medication comes in plastic containers of some sort, contain benzoyl peroxide and/or salicylic acid[7], and are applied to one's skin to treat and/or prevent acne. (Cantrell Depo p.14, lns 6-8; p. 17, lns 6, 11; Ex. 2) Since Opponent's good is used to treat a medical condition, it is regulated as a drug by the U.S. Food and Drug Administration. (Creech Depo p.32 lns.20-24; p50 lns 15-22). Although the International Trademark Classification System is intended to facilitate trademark processing, and not to extend or limit the registrant's rights, *(Acomb v. Polywood Plastics Corp.* 187 USPQ 188, 191 (TTAB 1975)) Opposer itself takes recognition of the differences in its submission of its Notice of Reliance on which it specifically states "third parties have commonly adopted and registered marks for cosmetic goods in class 3 and acne preparations in class 5." Notice of Reliance submitted 10/24/06). This is further supported by the fact that all of Mentholatum's marks on which it relies upon as the basis of this opposition are registered in International Class 5, Pharmaceuticals. (Notice of Reliance).

[7] Opposer claims "According to Applicant, this ingredient is considered an exclusive one and is the type of ingredient that distinguishes prestige skincare products from other skincare goods." Applicant, however, never made such statement about salicylic acid – as the record indicates – as this ingredient is a very cheap, inexpensive ingredient. If anything, this ingredient is an indicator of a very low-end product. It is Applicant's emulsified oxygen ingredient which is expensive to manufacture and which is considered exclusive. (Creech Depo. p. p. 10, lns 20-25; p. 11, lns 1-25; p. 12, lns 1-3; p. 37, lns 20-25, p. 38, lns 1-6; p.

Opposer argues "it is common for mark owners to offer both acne preparations, which fall in Class 5 and related skincare cosmetic goods, which fall in Class 3". Assuming any relevance, while there may be third parties who offer both cosmetic goods and anti-acne medications, neither Applicant nor Opposer offer *both*.

Applicant's identification of goods reads as follows: "Oxygenated skin care preparations, namely, creams, masks, gels and lotions for the face, hands, feet and body, not including acne preparations." Applicant's product is a luxury good consisting of topical solution used as an anti-aging cosmetic product. The main ingredient in Applicant's good is emulsified oxygen (*not* peroxide). The product is applied topically to the skin, often by a skincare professional such as an aesthetician or dermatologist, as part of a facial or similar spa treatment. (Creech Depo. p.20, lns. 10-12; p.28 lns.11-21; p.32, lns. 11-12). Applicant's product is not a drug nor is it intended to treat any medical condition – including acne. Therefore, it is not regulated as a drug by the U.S. Food and Drug Administration and unlike Opposer's marks, TherOx's mark has been applied for in International Class 3, Cosmetics

Contrary to Opposer's contention, *OXY is not "skincare"* it is *ONLY anti-acne medication*. Opposer correctly quotes Applicant's witness in that "OXY screams anti-acne medication" because *acne medication is all Opponent has ever offered under the OXY mark over the past 30 years* (Brown Depo. p.14, lns 19-25; p. 15, lns 1-11; Ex.2, 4 & 5); Opponent's OXY products are a very narrow product line. Although Opposers's *competitor*s may offer a variety of products under a mark which encompasses general "skincare," *Opposer does not*. Opposer attempts to create a tenuous-at-best connection to Applicant's goods through a chain of conjectures of what the parties' respective *competitors* may or may not do by way of expanding their product lines.[8] (Brief p.17-18). In addition, Opposer attempts to link its product to Applicant by way of ingredients *that Applicant does not use* to ingredients of third party competitors. Although a third party may offer a product in competition to Applicant, third party anti-acne medications

[8] Opposer is astoundingly speculative in its channeling of its competitor's business plans with the unsubstantiated statement: "The fact that one of Opposer's direct competitors has plans to offer products directly competitive to Applicant's intended goods evidences that the OXY and OXIUM skincare products are related" Additionally, this statement assumes that the ingredient offered at mass market is the ingredient in OXIUM – which it is not. (See Creech Depo. Ex. 3)

are not in competition with Applicant, therefore the ingredients found in third party anti-acne products are completely irrelevant.

Opposer stretches even further by relying upon the job description of a Wal-Mart buyer which requires the employee to purchase both acne products and anti-aging cosmetics (and presumably many other products) for its store. (Opponent's brief p 20 lns. 1-2). The fact that two products can be found in the same store do not automatically make them related. Before the existence of stores such as Wal-Mart, the court in *Federated Foods, Inc. v. Ft. Howard Paper Co.* even stated "A wide variety of products, not only from different manufacturers within an industry but also from diverse industries, have been brought together in the modern supermarket for the convenience of the consumer. The mere existence of such an environment should not foreclose further inquiry into the likelihood of confusion." *Federated Foods, Inc. v. Ft. Howard Paper Co.*, 544 F.2d 1098, 192 U.S.P.Q 24, 29 (C.C.P.A. 1976).[9] Additionally, in the letter Opponent references written by the Wal-Mart buyer, the buyer herself acknowledges that the OXY products are in the "acne category" of skincare – they are not skincare generally (Cantrell Depo., Ex. 3).

Opposer also claims that Applicant's good "could be used for over-the-counter anti-acne products" (Opposer's Brief p 18). As Opposer knows, Applicant's OXIUM product *cannot* be used as an acne treatment as its ingredient, emulsified oxygen, has not been approved by the FDA as a treatment for acne – Applicant legally cannot sell its product for acne treatment. (Creech Depo. p. 50, lns 15-25). In reality, in order for Applicant's good to be an effective acne treatment, not only would FDA approval be required, but based on its testing, a complete chemical alteration of the product is required (Creech Depo. p 49, lns 18-25; p. 50 ln. 1) Such an alteration would create a *wholly different good* which has *never been considered for use under the disputed mark.* (Creech Depo. p. 10, lns 6-19, p. 35 lns. 13-16, p. 49, lns 7-23). As Opposer knows, Applicant has stated that although it has no plans to create an anti-acne product, and should it at some point in the future decide to incorporate its emulsified oxygen ingredient into an anti-acne medication, it would be a *wholly different product* offered under a *wholly different mark.* (Creech Depo. p.35, lns 13-16).

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[9] See Also, *Hi-Country Foods Corp. v. Hi Country Beef Jerky,* 4 U.S.P.Q. 2d 1169 (T.T.A.B. 1987) where board held that not all food products are related simply because they are sold in the modern supermarket "with its enormous variety of food, cleaning, paper and other products."

Opposer suddenly claims, after *more than thirty years* of offering *nothing but acne medication,* to have plans to expand its line. (Cantrell Depo – Confidential Portion – p.52, lns. 18-23; p.53 lns.1-18). *During the discovery period of the instant opposition*, Opposer filed an intent-to-use application for its mark OXY on non-acne products.[10] Despite Opposer's disingenuous claim, its application was filed years *subsequent* to that of Applicant; Applicant filed its application March 22, 2002 and therefore Applicant has senior rights to its mark, OXIUM for non-acne cosmetic products.

Regardless of any irrelevant forecasting by Opposer, Opposer's goods are identified as "acne medication" and other medicated acne products – *not skincare generally.*[11] Opposer's "acne medication" and applicant's "Oxygenated skin care preparations . . . *not including acne medication*" are very different goods, are unrelated, and the circumstances surrounding their use make it unlikely that they will be encountered by the same type of consumer thereby causing the consumer to mistakenly believe the sources of the two are same or related. *In re Martin's Famous Pastry Shoppe, Inc.* 748 F.2d 1565, 225 USPQ 1298 (Fed. Cir 1984); *in re Melville Corp.,* 18 USPQ2d 1386 (TTAB 1991); and *In Re International Telephone & Telegraph Corp.,* 197 USPQ 910 (TTAB 1978).

iii. Factor 3: The Trade Channels Of Applicant's Goods Versus That Of Opposer's Are So Dissimilar That Consumer Confusion Is Very Unlikely.

In addition to an examination of the differences in goods, an examination of the circumstances in which the consumer encounter's the goods is required as well. *In Re Martin's Famous Pastry Shoppe, Inc.,* Supra. "The authority is legion that the question of registerability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sale of goods are directed" *Octocom Systems, Inc. v. Houston Computer Services, Inc.* 918 F.2d 937, 16 U.S.P.Q. 2d (BNA) 1783, (emphasis added). When the goods are identified in the application as essentially the same good, without any limitations, it is presumed that the identified goods

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[10] U.S. Application Serial No. 78/774055, filed December 15, 2005.

[11] Opposer even acknowledges "A person could use both Opposer's OXY products and Applicants OXIUM products" for their distinctly different purposes and functions, which further demonstrates their non-competitiveness.

are marketed in all normal trade channels for such goods and to all normal classes of purchasers for such goods *Truescents LLV v. Ride Skin Care, LLC,* (TTAB 2006); *In re Elbaum,* 211 USPQ 693 (TTAB 1981) *(Emphasis added).*

Here, as discussed above, the goods are identified in the registration of Opposer as "acne medication" and the goods of Applicant are identified specifically "not including acne preparations." Therefore, the goods of the respective parties are not "essentially the same good" therefore it cannot be presumed that Applicant's goods flow in all normal channels of trade for "acne medication" since Applicant's product is not "acne medication" nor is it medicated in any way. Admittedly, Opposer's OXY products are not anti-aging or anti-wrinkle products. (Cantrell Depo. p. 58, lns 4-6)

Opposer incorrectly states in its brief that since there are no limitations on trade channels of the respective application or registrations, then identity in trade channels must therefore be concluded. This conclusion is correct only when the goods are "essentially the same" *Truescents LLV v. Ride Skin Care, LLC,* (TTAB 2006)*; In re Elbaum, 211 USPQ 693* (TTAB 1981). See also *Schieffelin & Co v. Molson Cos. Ltd,* 9 U.S.P.Q. 2d 2069, 2073 (T.T.A.B. 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade *for those alcoholic beverages*") (emphasis added), and *Morton-Norwich Prods. Inc. v. N. Siperstein, Inc.* 222 U.S.P.Q. 735, 736 (T.T.A.B. 1984) ("Since there is no limitation in applicant's identification of goods, we must presume that applicant's paints move in all channels of trade that would be normal *for such goods*" (emphasis added).

Here, as discussed above, the goods are not essentially the same. It cannot be presumed that goods "*not including* acne preparations" follow in the same trade channels as "acne medication."

Again, for the sake of addressing Opposer's argument, and contrary to authority, Applicant addresses Opposer's contentions based on the record.

Substantial differences exist between the circumstances in which a consumer encounters the goods of Applicant and those of Opposer's. Opposer's anti-acne medication is sold in mass market retail outlets such as Wal-Mart, CVS Pharmacy, and other drug and grocery stores. (Cantrell Depo p.17 lns. 20-22).

The goods of Applicant have been and will be sold in smaller boutique retail outlets such as health and beauty spas, beauty salons, cosmetic counters of department stores, and in dermatologist's offices.

(Creech Depo. p.20, lns. 10-12; p.28 lns.11-21, p.32, lns. 11-12) Applicant's goods are shipped directly from Applicant in small quantities. (Creech Depo. p.41 lns. 5-16). Applicant does not sell its good in mass market retail stores and Opposer does not sell any of its goods in upscale department stores, beauty salons, spas, or dermatologist's offices. (Brown Depo. p. 51, lns 23-25, p. 52. lns 1-25, p. 53, lns 1-6; Cantrell Depo. p. 57, lns 9-21) Since there is absolutely no overlap in trade channels, there is little likelihood of consumer confusion.

iv. Factor 4: The Conditions In Which The Unsophisticated Consumers Of Opposer's Products Purchase Opponent's Goods Differ Greatly From The Conditions In Which The Highly Sophisticated Consumers Of Applicant's Goods Purchase Applicant's Products.

It also cannot be presumed that Applicant's consumers are the same class of consumers of "acne medication" since Applicant's product is not "acne medication." Again, as Opposer acknowledges, such a presumption applies when the goods are the same and as demonstrated in the identification of goods and services of the marks, regardless of what the record may reveal. *(Octocom Systems, Inc. v. Houston Computer Services, Inc. 918 F.2d 937, 16 U.S.P.Q. 2d (BNA)1783)(Emphasis added). (In Re Martin's Famous Pastry Shoppe, Inc., Supra).*

Given the differences in identification of goods in the respective application and registration, Opposer again turns to the record to support its flimsy argument that the consumers of anti-acne medication (teenage boys) are the same class of consumers of Applicant's anti-*aging* medication (women *who have aged*). Therefore, Applicant again addresses Opposer's arguments in spite of the authority acknowledged above.

Likelihood of confusion is less probable where the goods are expensive and purchased after careful consideration. *See Electronic Design & Sales Inc. v. Electronic Data Systems Corp.,* (CA FC) 21 USPQ2d 1388 (1992), *Dynamics Research Corp. v. Langenau Mfg. Co.,* 704 F.2d 1575, 217 USPQ 649 (Fed.Cir. 1983), and *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.,* 657 F.2d 482, 489, 212 USPQ 246, 252 (1st Cir. 1981).

Applicant's good retails between $70 and $100. (Creech Depo. p.11, ln. 25; p. 12, ln. 1). Given the relatively high cost of this skincare product, a consumer of Applicant's product is likely to be highly sophisticated in its decision to purchase such a product. This is further demonstrated by the information

provided by a skincare professional and literature accompanying the product to the client prior to purchasing the product. (Creech Depo. p.33 lns. 3-7).

Opposer's anti-acne medication, on the other hand, retails between $4.99 and $6.99 (Cantrell Depo p.18, lns.15-16). In addition, Opposer often runs promotions of its product such as "buy one get one free" and distributes coupons for its product in various publications, thus bringing down its retail pricing structure even further. (Brown Depo. p.39, lns. 17-25; p.40, lns.1-7; Cantrell Depo p.30, lns.7-12).

The difference in retail price is not only a reflection on the differences in the goods, but demonstrates the disparity in the relevant consumers. Applicant's product is an anti-aging cosmetic cream/lotion. The consumers of Applicant's product are women, age 30 to 65 with a disposable income on which to spend on such luxury goods, and who spend time at day spas and salons. (Creech Depo. p.12, ln. 25; p.13 lns.1-14).

Opposer's ultimate user is teen boys ages 12 to 18 (Cantrell Depo. p.18 lns. 10-11) and crafts its marketing campaign towards these teenage consumers that do not conduct research, but rather those who are "heavily influenced by all of the advertising" Opponent conducts for the brand (Brown Depo. p.48 lns 13-23).

Clearly, Opposer places its brand to appeal to teenagers (Cantrell Depo p. 59, lns 2-34), promotes its brand in any way "that might help influence the teenage consumer that we were targeting to purchase OXY" (Brown Depo.p11, lns.18-20) such as by placing ads in television programs "heavily viewed by a teenage audience" (Brown Depo p. 26, lns 3-10.)

In complete reversal from this stance, and in attempt to create a connection between the consumer of Applicant's good with the consumer of its goods, Opposer argues its relevant consumer is the mother of teenage boys; (Cantrell Depo. p.18 lns. 5-9[12]), however, this is completely against common sense as demonstrated in its own contradictory marketing campaign.

Opposer's marketing campaign includes the following promotions of which it is laughably arguable that mothers, aged 35 to 65 years of age, are the alleged target consumer: Sponsorship of extreme

[12] We note that Mr. Cantrell's deposition took place 8 days after Mr. Brown's deposition, giving Mr. Cantrell the opportunity to attempt to reform Mr. Brown's statements that "the product was marketed primarily to the teenage population." (Brown Depo. p. 11, lns 13-20, p. 20, lns 11-14)

sports players and events (where the sports include BMX bike races, Skateboard, FMX motorcycle races, and street luge and where teen boys are the primary attendee); hosting of "chill pads" or "party pad" booths at such events where plastic beads with the OXY mark are distributed; distribution of "hero cards" with extreme sport's athletes statistics; giveaways at such events where "kids get whipped into a frenzy"; print ads placed in magazines such as Teen People, Sports Illustrated for Teens, Sports Illustrated for Kids, Scholastic (sent directly to schools), Future Skateboarding, Transworld (Skateboarding and Snowboarding magazine), DC Comics and MAD Magazine (Comedic magazine); an *animated* television campaign, cartoons characters marketing its product, television ads such as one featuring a kid in a cafeteria, which ran on MTV, MTV 2, Comedy Central (where the commercial ran all day), on NBC (when the commercial ran when teenagers are home); product placement in an MTV show, The Real World; a television show called "OXY Support Your Jock" where kids at a high school are featured; promotions at children's camps; "back to school" promotions where the winner won a trip to the MTV Music Video Awards, hosting of a website that offer's instant messaging and screen savers; and last but not least, the "Oxy Girls" (one of which is a water skier and the other a professional cheerleader) where on Opposer's website a user can download pictures of the "OXY Girls" and "vote for your favorite OXY girl." (Cantrell Depo. p.24, lns. 6 – 11; p.25, lns. 1-23; p.26, lns. 1-23; p.27, lns. 14-15; p.29, ln. 14; p.31, lns.1-23; p.32, lns.19-23; p.34, lns. 1-16; p.36, lns.1-23; p.37 lns.1-16; p.28, l13-22; p.39, lns. 20-23; Ex. 4; Brown Depo. p.23, lns 14-18; p.39, lns.8-13; p.42, lns. 16-19; p.44, lns. 6-9; p. 58, lns. 10-13; Ex 8, 10, & 11).

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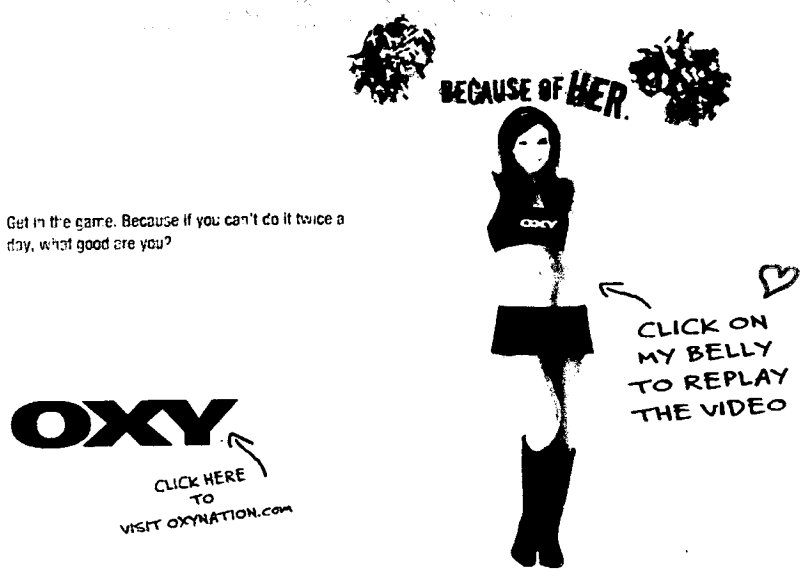
The following is an example of Opposer's marketing efforts supposedly marketing towards mothers of teenage boys:

"Oxy Girl" found on oxynation.com referenced in Cantrell Depo. p. 37, lns 1-9; Exhibit 2:



It is highly unlikely that "mothers of teenage boys" is truly the target consumer of which the "Oxy Girls," the MTV spots, the sponsorship of skateboarding and other events where "kids get whipped into a frenzy," and the other promotions above attempt to entice the purchase of the OXY acne medications. Contrary to Opposer's assertions, Opposer's witnesses specifically agreed that "the target market for all of the OXY products was the teenage market." (Brown Depo. p.53, lns. 12-20; Cantrell Depo. p. 59, lns 2-4, lns 11-13).

Opposer further argues that the mother of the teenage boy is the one actually paying for the product, therefore she is the target consumer. Although the funds for such a purchase may originate from the mother of a teenage boy, the teenage boy is the relevant consumer to whom Opposer directs its advertising attention and the source of the funds is irrelevant. (On the flip side, if a woman purchasing Applicant's OXIUM anti-aging cream, which is rather expensive, uses money her significant-other has provided, the target consumer is still the woman, not the significant-other).

Finally, should Opposer ever fulfill its fantasy of creating a non-acne product under the OXY brans, OXY-branded products will never be a luxury product as the mark OXY brand is associated with cheap products (always under $15) found in Wal-Mart, CVS Drugstores, and grocery stores; therefore there *still* would be no overlap in goods, class of consumer, nor trade channels. (Brown Depo. p. 52, lns 10-16; Cantrell Depo. p. 18, lns. 12-16).

The connection Opposer attempts to create between the relevant consumer of its goods verses that of Applicant's is tenuous at best. Given the vast differences in consumer sophistication, as demonstrated by the cost of the goods and the disparity between the classes of relevant consumers, there is virtually no possibility of consumer confusion.

v. Factor 5: Opponent's mark is NOT Famous and Given The Dissimilarity In The Marks And The Goods At Issue, The Extent Of Use Of Opponent's Mark Is Irrelevant In Determining Likelihood Of Confusion In This Case.

"It is the duty of a plaintiff asserting that its mark is famous to clearly prove it." *Blue Man Productions Inc v. Tarmann*, 75 U.S.P.Q.2d 1811, 1819 (TTAB2005). Here, Opposer argues fame by association. In claiming "fame" of its mark, Opposer argues that since it is a sponsor of a famous event, the Dew Action Sports tour, and a famous athlete, that it too is famous. In addition, it argues that since so many teens have visited its website, downloaded screensavers and music, accepted its free giveaways, participated in its contest to win tickets the MTV Video Music Awards, and used its instant messaging service, then it must be famous. Unfortunately for Opposer, mere exposure does not equal fame. It is the popularity of the *MTV Music Video Awards*, the popularity of *instant messaging* among teens, of the *music* available for download, of the *images* of the screen savers, and the *free* products that draw participants– not the mark of the entity sponsoring the event or conducting the contests, etc. For example, it is the image of the *girl* in a bra and mini-skirt revealing skin well below her belly button that draws teenage boys to download the image of the "OXY Girl" from the OXY website; it is very unlikely that the brand printed on the bra is what makes the image popular.

[redacted]

In fact, although Opponent claims that "people encounter OXY products at almost *any* retail outlet" (Opponents Brief p. 27, emphasis added); in reality, Opponent's products are *not* found at: department stores, health and beauty spas, medi-spas, salons, dermatology offices, beauty supply stores, or cosmetic counters.

Although Opponent's OXY mark may be known in its particular niche anti-acne medication market, it is not famous. In addition, it is so dissimilar in mark, goods, market and consumer than that of Applicant, that its extent of use of the brand OXY is irrelevant in determining consumer confusion. Therefore, this factor carries little, if any, weight in an analysis of consumer confusion between OXY and OXIUM.

vi. Factor 6: Neither Mark At Issue Is Used On Similar Goods; Therefore This Factor Is Not Relevant In This Case.

Opponent claims that its mark is not diluted in the field of skincare; however, again assumes that Opponent has any rights to skincare products generally. Opponent's mark, at most, is not diluted in the field of *acne-medication*. Further, Opponent's OXY mark is incorporated into many other third party federally registered marks for unrelated products, such as cleansers (OXY DEEP and OXY PLUS), detergents and cleaning preparations (OXY BLAST, OXY-STEAM), water treatments (OXY-KEM), medical equipment leasing (OXYMED OXY), commodity trading services (OXYDIRECT), mints (OXY MINTS), such that Opposer cannot claim that is mark is famous such that it is given "super-trademark" protection to preclude use on unrelated products.[13]

[13] Opposer has not pled nor argued a dilution basis for this Opposition, thus Applicant did not prepare or submit evidence concerning third party dilution of Opposer's mark, but judicial notice of the mere existence of third

Opponent's mark OXY is merely descriptive of its product's benzoyl peroxide content, which is a main ingredient in many acne medications. While many companies tout their product's content of benzoyl peroxide, Applicant does not as it does not contain benzoyl proxide (nor does it contain salicylic acid, Opponent's other active ingredient). Applicant's fanciful mark OXIUM is not used on any other goods than Applicant's applied-for products and does not refer to benzoyl peroxide.

This factor, therefore, weighs in favor of Applicant.

vii. Factor 7: There Has Been *No* Instances Of Actual Confusion Between The Mark Or Goods Of Applicant And Those Of Opposer.

There have been no instances of consumer confusion between the marks and goods of Applicant and those of Opposer's. (Opposer's Response to Interrogatory No. 22.) During Applicant's test-marketing, none of its consumers believed the OXIUM product to be even remotely associated with Opponents OXY products.

This factor, therefore, weighs in favor of Applicant.

viii. Factor 8: Both Marks Were Used Concurrently With *No* Instances Of Any Consumer Confusion.

Opposer has been using its mark OXY on its anti-acne products for approximately thirty years; Applicant conducted a test-marketing campaign during which there were no instances of consumer confusion. (Opposer's Response to Interrogatory No. 22.)

ix. Factor 9: Both Applicant And Opposer Limit Use Of Its Marks To Their Separate Niche Markets; Therefore This Factor Is Irrelevant In The Analysis At Hand.

Opposer limits its mark to use on anti-acne products sold at mass market retail stores; Applicant limits its mark to its luxury oxygenated solution available only at specialty retailers. Since neither Opposer nor Applicant use its marks on a particularly wide variety of goods, this factor is generally irrelevant in this likelihood of confusion analysis.

x. Factor 10: There Is No Market Interface Whatsoever Between Applicant And The Opponent.

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party registrations for marks incorporating the OXY term on products unrelated to anti-acne medications at the USPTO is requested. This argument is presented solely to rebut Opposer's claimed strength of its mark in a likelihood of confusion analysis.

One must analyze and compare the identity of retail outlets and purchasers as well as the similarity of advertising media used. *La Dove Inc. v. Playtex Jhirmack Inc.*, 19 U.S.P.Q. (BNA) 1149 (DC SFla 1991). The goal of such comparisons is to determine if there would be an overlap in marketing channels that would significantly add to the likelihood of consumer confusion. *Wynn Oil Co. v. Thomas*, 5 U.S.P.Q. (BNA) 1944 (CA 6 1988).

There is no market interface, nor potential for market interface, between the goods of Applicant and those of Opposer. Opposer sells its low-priced anti-acne medication in mass market retailers such as big-box stores, mass retail stores, drug stores, and grocery stores. Applicant has sold its rather expensive product exclusively through high end beauty and health salons, luxury day spas, boutique stores, and certain dermatology offices and intends to sell it through high end department store's cosmetic counters, cosmetic stores, and medi-spas. Applicant's goods are not found in any retail outlet in which Opposer's goods are found, nor does Opposer sell its anti-acne medication in any of the types of retail outlets has or will sell Applicant's products.

As discussed above, the women consumers of Applicants luxury product is of a higher sophistication level than the teenage boy consumer of Opposer's goods; as demonstrated by the marketing strategy of Opposer.

This factor, therefore, greatly favors Applicant.

xi. Factor 11: Applicant's Mark Is A Registerable Trademark Of Which Applicant Will Be Able To Exclude Others From Using On Skincare Products.

Applicant's mark is a fanciful mark found nowhere else. Aside from this weak Opposition by Mentholatum, the USPTO examining attorney originally found the Applicant's mark OXIUM registerable in Class 3 for oxygenated skincare products with all rights pertaining thereto. This factor, therefore heavily weighs in favor of Applicant.

xii. Factor 12: Although There Is No Potential For Confusion, Were Any Confusion To Occur It Would Be *De Minimus* At Most.

Given the great differences in the marks, the goods, their trade channels, their consumers, and the conditions under which they are purchased, any consumer confusion is very unlikely. If any confusion were somehow to occur, it could only be momentary and *de minimus* at most.

V. CONCLUSION

In *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.* the Court stated "We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal." 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), *citing Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g* 153 USPQ 412 (TTAB 1967).

The "practicalities of the commercial world" surrounding the instant opposition indicate that, the mark OXIUM is dissimilar to Opposer's mark OXY, a non-acne anti-aging product is a dissimilar to an anti-acne product, older women are a different class of consumer with a different level of sophistication than teenage boys, and luxury retail outlets are a dissimilar trade channel than mass-market retail and grocery stores. Therefore, the evidence clearly indicates that there is no likelihood of confusion under Section 2(d) of the Trademark Act and therefore the instant opposition should be dismissed.

DATED: May 8, 2007

TRW LAW GROUP

By _____
TAWNYA R. WOJCIECHOWSKI
Attorneys for Applicant
Therox, Inc.

EXPRESS MAIL CERTIFICATE

I hereby certify that an original of each document

(1) **Applicant's Opposition Brief** and

(2) **Confidential Portions**

is being deposited with the United States Postal Service as Express Mail under Express Mail Number:

EV 691426565

marked Post Office to Addressee in an envelope addressed to:

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313-1451 on the date shown below:

Diane Magaletta-Barnes

(Typed or Printed Name of Person Signing Certificate)

(Signature)

May 8, 2007

PROOF OF SERVICE

I am employed in the County of Orange; I am over the age of eighteen years and not a party to the within entitled action; my business address is TRW Law Group, 19900 MacArthur Boulevard, Suite 1150, Irvine, California 92612-8433.

On May 8, 2007, I served the following document(s) described as **Applicant's Opposition Brief** and **Confidential Portions** to the interested party in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Leigh Ann Lindquist
Gary D. Krugman
Attorneys for Opposer
SUGHRUE MION, PLLC
2100 Pennsylvanie Avenue, N.W.
Washington, D.C. 20037-3202

☐ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Costa Mesa, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

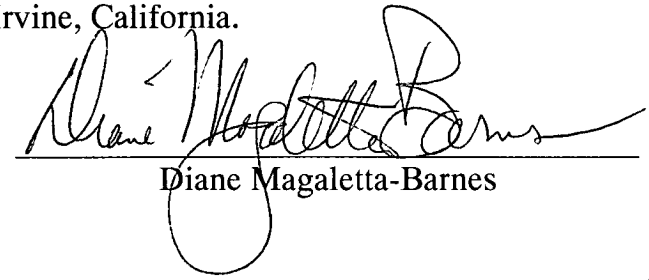
X **BY OVERNIGHT DELIVERY:** I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by the overnight service carrier to receive documents, in an envelope or package designated by the overnight service carrier.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).

☐ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **FEDERAL:** I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 8, 2007, at Irvine, California.



Diane Magaletta-Barnes